THE

BENCH AND BAR

OF

TEXAS.

BY

JAMES D. LYNCH,

Author of "Heroes of the South," "Kuklux Tribunal," "Clock of Destiny," "Kemper County Vindicated," "The Bench and Bar of Mississippi."

'Tis not in mortals to command success, but
We'll do more, Sempronius, we'll deserve it.

—ADDISON'S CATO.

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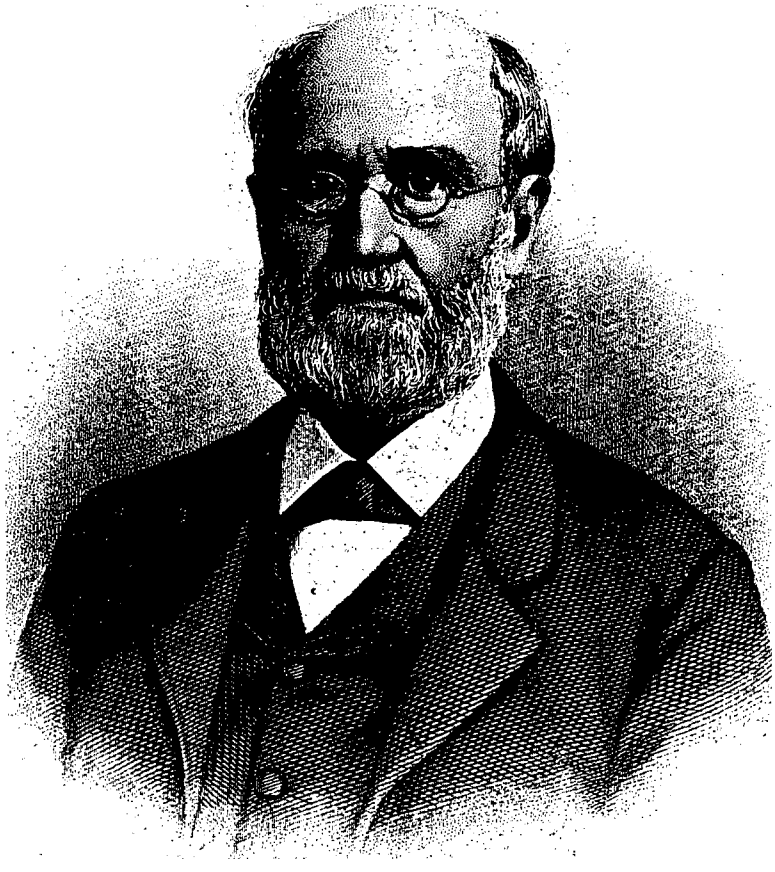

John W. Harris

CHAPTER VIII.

THE STATE BAR — EMINENT LIVING LAWYERS — JOHN W. HARRIS — J. E. SHEPARD — VOLNEY E. HOWARD — FRANK SEXTON — J. H. REAGAN — T. N. WAUL — W. P. BALLINGER — J. W. THROCKMORTON — JOHN HANCOCK — JOHN SAYLES — N. G. SHELLY — R. B. HUBBARD — A. J. PEELER — WM. M. WALTON — JACOB WAELDER — A. W. TERRILL — GEORGE GOLDTHWAITE — N. W. BATTLE — M. D. HERRING — CHARLES STEWART — ALEXANDER WHITE — THOMAS HARRISON — J. M. ANDERSON — W. S. HERNDON.

JOHN W. HARRIS.

This distinguished lawyer was born and reared in Nelson County, Virginia, of which his parents were also natives. His ancestors for several generations were sturdy and independent farmers of the Old Dominion. The family came from England at an early day and settled on the James River, east of the Blue Ridge, and for the most part within sight of the mountains. Like all of the old English families of Virginia, the Harrisons were proud of their origin, and devoted to the interest of the mother country until its oppressive measures kindled the fires of liberty upon their altars; and when the war for independence broke out they furnished many a valiant soldier to the Continental army.

The subject of this sketch was placed at an early age in a country school which possessed few facilities for the promotion of either progress or ambition, and without even the incentive of rivalry his advancement was slow. But as he approached the years of manhood he began to realize the deficiency of his education, and reflecting with regret upon what he conceived to be due largely to his remissness and want of application, he determined, if possible, to

retrieve his misspent time. But how to accomplish this in the most speedy and effectual manner, and what course of life he should mark out for himself, were questions necessary to be decided at once. He had been reared on a farm, in the midst of a community of farmers, but his taste and experience taught him that this calling would not satisfy his newly awakened ambition and aspirations, and he determined to prepare himself for the study and practice of law.

Armed with this resolution, which was but intensified and strengthened by the difficulties that beset his way, he entered with vigor and zeal upon the chosen path of his destiny. The first step necessary to the most happy accomplishment of his design, was to acquire a collegiate education. But how to do this was a question of more serious import than any which had yet presented itself. His father's family was large, and the income of his farm was small. He could render him no material assistance. But it is the characteristic of genius, however trammeled by difficulty, to break forth from the gyves of untoward circumstance, and, spreading the wings of resolution, soar away triumphantly to the sunny fields of success. Young Harris determined to rely upon his own resources and educate himself. His mother had given him a small body of land. This he made available to some extent, and at once put his plans in operation. In the fall of 1830 he entered Washington College (now Washington and Lee University) at Lexington, Virginia, in which he pursued his studies for two years with the utmost diligence and success. Having at the end of this time casually met some acquaintances who were attending the University of Virginia, he was advised by them to complete his education there; and while the change, in consequence of the increased expense which it entailed, was more compatible with his ambition than with his means, he was so much impressed with the superior advantages which the University afforded that he again bade defiance to fate, and in September, 1832, entered that celebrated institution, in which, for five years, he prosecuted his studies

with close and vigorous application. During this time he graduated in six departments of the University, including that of law, in which he attained distinguished proficiency.

Soon after leaving the University he obtained license to practice in the courts of his native State; but the *viginti annorum lucubrationes*, which custom at that time required of a young man at the bar of Virginia, however competent he might be, before he could expect to be entrusted with important cases, caused many talented young lawyers to seek more propitious and less ceremonious fields. This conventional and arbitrary restraint was particularly repugnant to the ardent spirit and impulsive vigor of Mr. Harris, and in the fall of 1837, within a few months after leaving the University, he immigrated to Texas and located in Brazoria County, near the mouth of the Brazos River, where, in January, 1838, he began the practice of his profession.

This county was at that time, perhaps, the most populous and wealthy in the Republic, and offered a most promising field to the legal profession. Titles to real estate were often conflicting and uncertain, and the courts were thronged with adverse claimants seeking the adjustment of their rights. The professional services of Mr. Harris were brought into immediate demand. His energy and talent engaged the attention and confidence of clients, and he soon found himself immersed in the duties of an extensive practice.

Soon after he had settled in Brazoria he became a member of the law firm of Wharton & Pease, and after the death of Colonel Wharton, which occurred in 1839, the firm of Harris & Pease became one of the most noted in the Republic, afterwards one of the most distinguished in the State, and continued until Mr. Pease was elected Governor of Texas in 1853. When Mr. Harris came to the bar of the Republic it contained but four judicial districts, which extended over the vast expanse of its inhabited territory, and it was arranged between him and Mr. Pease that the latter should remain permanently in Brazoria while he should attend the courts of the six counties composing the district, and they soon found themselves employed in most

of the important cases that came before the various courts of the district. They began their practice in the Supreme Court in 1840, when it was first organized. In 1839 Mr. Harris was chosen to represent the county of Brazoria in the first Legislature that convened at Austin, which had recently been selected as the capital of the Republic. During the canvass he endeavored to impress upon the people the propriety of abolishing the civil or Mexican law then in force, which was written in a language unintelligible to a majority of the citizens, and contained in books, for the most part, beyond their reach, and urged the adoption of the common law as the law of the land. They seemed to be indifferent, however, as to which system should prevail, and elected him untrammeled by any positive public expression in regard to the measure. But he made it the chief object of his legislative mission. Although there were several other eminent lawyers in the House of Representatives, he was appointed by Hon. David S. Kaufman, then Speaker, as chairman of the Judiciary Committee of that body. In due time he introduced a bill to repeal the Mexican laws and to adopt the common law, and procured the recommendation of its passage by the Judiciary Committee, it being opposed by only two members, who made, however, no adverse minority report. Considerable opposition to the bill was soon manifested among the lawyers of the House, based chiefly upon the ground that the common law was not sufficiently liberal in its provisions regarding the rights of married women. This opposition was distrusted by General Houston, who gave his support to the measure, and its adoption was then assured. But to obviate all grounds of objection, Mr. Harris added the feature regulating marital rights, and the bill was passed. This feature was incorporated five years later in the first Constitution of the State, and was pronounced to be a grand discovery of the age. Similar provisions have since been adopted by many of the States of the Union.

It next became necessary that general statutes should be enacted in modification and aid of the common law to make it conform to the state of society and to the government

and polity of the Republic, as had been done both in England and in the States. In view of this Mr. Harris had procured a copy of the General Statutes of Virginia, which had been originally enacted in England and adopted in Virginia during the period of the American Revolution. These had been ably construed by the courts and their meaning and import well ascertained and settled, and Mr. Harris caused exact copies of them to be made, which he introduced as bills in the House of Representatives, and they were generally passed without amendment. But in civil cases the common-law system of pleading was rejected, and the proceeding by petition and answer was retained. The distinction between law and equity was discarded, and the courts were empowered to administer both without separate dockets, and with the same form of proceedings, and this was found to be a decided improvement upon the old system, which maintained separate courts of law and chancery, as already described in a preceding chapter.

In 1846 Mr. Harris was appointed Attorney-General of the new State by J. Pinckney Henderson, the first Governor of Texas after its admission into the Union. This appointment was made without the least solicitation on his part, or of any of his friends, but, notwithstanding the inadequate salary, he accepted the position. He discharged the duties of this office with signal ability, and gave such general satisfaction that Governor Wood, the successor of Governor Henderson, reappointed him to the position, declaring, in answer to an urgent application for the office by one of his strongest supporters, that the interests of the State required the services of Mr. Harris.

He was married in 1852 to Mrs. Annie P. Dallam, of Matagorda, Texas, daughter of Hon. S. Rhodes Fisher and Mrs. Ann P. Fisher, formerly a Miss Pleasants. They were both reared in Philadelphia, and emigrated to Matagorda at the early period of 1832. This talented and noble lady has adorned his home with the most admirable graces and accomplishments of her sex.

In 1854 Gov. Pease appointed him in conjunction with James Willie and O. H. Hartley, to revise the laws of the

State. The penal code and code of criminal procedure were prepared by Mr. Willie, to the provisions of which Mr. Harris gave his assent without any material alteration of their features. The task of preparing a code of civil procedure was assigned to Mr. Hartley, and that of revising the statutes to Mr. Harris. They performed their duties, but the Legislature seemed to be satisfied with the practice as it existed and with the general statutes previously enacted, and the reports of Messrs. Harris and Hartley never received legislative action.

Mr. Harris has always been a Democrat of the purest school. Educated amid scenes impressed with the very genius of Mr. Jefferson, and under instructors whose sentiments were moulded by his association and influence, he drew his political inspirations from the very atmosphere in which the great statesman lived and moved, and imbibed his principles from the fountains which he struck from the rock of human liberty. The Civil War he deplored as unnecessary. He was devoted to the Union established by our fathers, and felt all the indignation of a true Southerner when he saw it fall under the control of a party avowedly inimical to the great principles upon which it was founded; and while he was not in favor of secession as the proper mode of redress, he accepted it as a fixed and accomplished alternative, and gave his support to the Confederate cause.

When the storm of revolution had passed away and the courts were reopened, he resumed the practice of his profession in copartnership with Marcus F. Mott, Esq., and subsequently associated with Branch T. Masterson, Esq.; but his private fortune was now large and he confined his practice chiefly to important cases in the higher courts.

In 1873 he was elected to the House of Representatives of the Fourteenth Legislature from the counties of Galveston, Brazoria and Matagorda. One of the most important questions that came before this body was a proposition to amend the Constitution of 1869, which had been framed under the auspices of military rule by persons inimical to the views and sentiments of the people, and largely by per-

sons who had no permanent interest in the State, and which had been adopted by the people under the constraint of a still more distasteful alternative. They had either to accept it or remain indefinitely under the galling yoke of military rule. The Fourteenth Legislature, being largely Democratic, was desirous of annulling a Constitution which had been thus forced upon the people and of affording them an opportunity of adopting one of their own choice.

The Constitution of 1869 permitted amendments to be made by a joint resolution of the Legislature proposing the amending features and their submission to the vote of the people. Under this provision, Mr. Harris, who was a member of the Committee of the House upon Constitutional Amendments, conceived the idea of readopting in this manner the Constitution of 1845, which had given general satisfaction, which had been thoroughly construed by the courts, and which Mr. Webster had declared to be the best that had ever been written. Taking this Constitution as a basis, and changing its features with a sparing hand, he caused it to be carefully printed, and then submitted it to each House. Its passage was recommended by a committee of the House, and afterwards by a joint committee of the two Houses; but a strong feeling had in the meantime arose in favor of calling a constitutional convention, which finally prevailed, and the convention of 1875 convened and framed the present Constitution of the State. This Constitution was in some respects unfortunate. It has never given satisfaction, and under its provisions amendments seem almost impossible.

The most important cases in which Mr. Harris has been engaged were those of Hosmer *v.* De Young, 1 Texas, 754, and League *v.* De Young & Brown, 2 Texas, 477; and as the questions involved in these cases were important in their bearing upon the origin and validity of a large number of land titles in Texas, the circumstances of the latter case and the points raised by the respective counsel, taken from the brief of Mr. Harris, are given in full.

The laws of the Republic of Texas gave to each head of a family, who was a citizen at the date of the declaration

of independence, one league and labor of land, and boards of land commissioners, referred to in a former chapter, were elected by Congress for each county, whose duty was to hear the evidence of applicants and to grant certificates to them for such quantities of land as they were respectively entitled to receive under the provisions of the law. But it soon became apparent that some of those boards had corruptly issued certificates to persons who were not entitled to them, and to fictitious persons, for many millions of acres of the public lands.

Transfers of these certificates were proven, or purported to be proven or acknowledged before notaries public, and were duly certified for registration. The holders of these fraudulent certificates located them, and required the surveyors to survey the lands on which they were located.

President Lamar, foreseeing that the vast public lands of the Republic would soon be appropriated by these fraudulent certificates unless he should interpose his power to prevent it, issued his proclamation prohibiting the granting of patents upon all land certificates until Congress could meet and pass such laws as should be found necessary for the protection of the public domain.

When Congress met, it passed the "Act to detect fraudulent land certificates, and to provide for issuing patents to legal claimants."

Under this act three land commissioners were elected for each county in the Republic, who constituted the boards of land commissioners of their respective counties.

Besides these, Congress elected three commissioners for the district east of the Trinity River, and a like number for the district west of that river (commonly called boards of traveling commissioners), whose duty it was to go to each county in their respective districts, and in connection with the county commissioners, to investigate the proceedings of the prior or first boards, and ascertain what certificates had been properly issued.

Such as they found to be legal and genuine, they were to report to the commissioner of the land office, so that patents might be issued upon them.

The law prohibited under heavy penalties the surveying, or patenting of lands upon any certificate not thus recommended.

It also provided that the owner of any unrecommended certificate might sue in the District Court of the county in which it was issued, to establish its validity.

Hosner and League, each holding a certificate which the new boards of commissioners had failed to recommend as genuine, or legal claims, and which had not been established by suit in the District Courts, respectively made applications to the surveyors for the location and survey of their certificates. This, under the law, the surveyor refused to do. Each then applied to the District Court for a *mandamus* to compel the surveyors to make the surveys. These applications being refused, the holders of the certificates applied to the Supreme Court of the State, and the cases were there argued for the appellees by Mr. Harris, as Attorney-General, and the judgments of the District Court were affirmed.

Thomas M. League, took his case by a writ of error to the Supreme Court of the United States, before which it was ably argued by George Wood, Esq., of New York, for the plaintiff, and by Mr. Harris, for the defendant, who was employed by the Governor as the only attorney to represent the interest of the State.

In this case the counsel for the plaintiff in error contended that the Republic of Texas was under an obligation amounting to a contract, to make grants of lands to claimants who came before the first board of commissioners and made the proof prescribed by the Act of the Republic of Texas of 1837.

2d. That the grant of the certificate in question by the first board — a tribunal of competent authority, was in effect a judicial decision which was final, and, whether fair, or fraudulent, the validity of the claim could never be successfully impeached, nor could it ever be inquired into except upon appeal, or by writ of error, for which the law had made no provision.

3d. That the certificate constituted a perfect right to the

quantity of land awarded, and all legislation of the Republic of Texas appointing new tribunals to examine into the genuineness and legality of such claims, or to limit the time within which the holder or assignee of such certificates might demand a survey and patent, was void, because it impaired the obligations of a contract, and that the eleventh section of the Constitution of the State of Texas declaring all certificates for head-right claims issued to fictitious persons, or which were forged, were null and void from the beginning, and that the act providing that the District Courts should be opened till the 1st day of July, 1847, for the establishment of such unrecommended certificates, was also null and void, as it impaired the obligation of contracts.

The points made by Mr. Harris, the counsel for the defendant in error, were:—

1. That the laws of Texas, enacted while she was a Republic, could not be regarded as inhibited by that provision of the Constitution of the United States which says "that no State shall pass any law impairing the obligation of contracts." Nor could the eleventh article of the Constitution of the State be so regarded, for this was also adopted during the existence of the *Republic*, and it formed a part of the treaty between the two governments for the admission of Texas as one of the States of the Union.

It may be said that this article was offered by Texas as an indispensable condition of the contract or treaty for annexation, and was accepted by Congress, which is not prohibited from enacting laws or making treaties impairing the obligations of contracts.

2. That there was no obligation on the part of the Republic to issue the certificate in question; that the granting of the certificates was based upon no consideration, which is an indispensable requisite of every legal and valid contract; and that the laws of the Republic, and the eleventh article of the Constitution complained of were remedial laws, which could be altered, or even repealed, by the power that made them; and that the plaintiff in error had certainly no cause of complaint against the eleventh article of the Constitution, since that revived in his favor a remedy which he had lost

by limitation in failing to institute suit before the 1st day of January, 1844, and since he had also lost this constitutional remedy by failing and refusing to accept its provisions.

3. That the Congress of the Republic had full power to pass laws creating new boards of commissioners, or other tribunals to revise the acts of the first boards, granting fraudulent certificates, and to reverse their decisions; that had these certificates been fraudulently granted by the highest courts of the Republic the legislative power could have created new tribunals to revise and reverse their fraudulent judgments.

4. That this was a suit against the State without its consent.

5. That the plaintiff, by his own laches, had lost his right to sue in the District Court for the establishment of his claims, and that after all right of action had been barred he could not make application to the District Court for a *mandamus* to compel the surveyor to survey the land.

6. That if while Texas remained an independent Republic her Congress had passed laws annulling all these certificates, such would have been the effect of these laws.

It will be seen by the decision in League *v.* De Young et al., 11 Howard, 200, that the Supreme Court of the United States sustained these several positions taken by Mr. Harris, the counsel for the defendant in error.

This case was avowedly taken to the Supreme Court of the United States as a test case, with the hope of obtaining a decision to the effect that the statutes complained of and the eleventh article of the Constitution were repugnant to the Constitution of the United States, and consequently null and void.

Had such been the decision it is easy to see how disastrous would have been the consequences. The court in its opinion says: "Immense numbers of these certificates were soon put in circulation, either forged or fraudulently obtained, which, if confirmed by surveys and patents, would soon have absorbed all the vacant land of the Republic."

Mr. Harris was employed in 1872 by Gov. Davis to assist

Hon. William Alexander, then the attorney-general of Texas, in the defense of a suit which had been instituted by the International Railroad Company *v.* A. Bledsoe, controller of Texas.

The object of the suit was to compel the controller to countersign and register claims to a large number of the bonds of the State, claimed by the company under the act of the Twelfth Legislature, passed August 5, 1870.

This was entitled "An act to incorporate the International Railroad Company, and to provide for the aid of the State in constructing the same."

The aid provided was the donation of the bonds of the State to the company of ten thousand dollars per mile, the road to be constructed from the northeast to the southwest boundary of the State, a distance of six hundred miles. These bore interest at the rate of eight per cent, payable semi-annually in the city of New York.

The bonds had been signed by the governor and treasurer, and were required by the provisions of the charter to be countersigned and registered by the controller. This the controller refused to do. The company after but little delay made application to the District Court of Travis County for a *mandamus* to compel the controller to countersign and register these bonds.

The defendant appeared and demurred, generally and specially, to the petition, and among other special causes assigned the following: —

1. That it was, in effect, a suit against the State.

2. That the controller could not be compelled to exercise his official discretion in any particular way.

The defendant further answered that the passage of the act of incorporation was procured by means of fraud, bribery and corruption, and was therefore null and void.

In the argument before the Supreme Court the points mainly relied upon by Hon. George Clark, the attorney-general, and Mr. Harris, the counsel for Bledsoe, were: —

1. That the duty imposed by the act of incorporation required on the part of the controller an exercise of discretion

or judgment, and that a *mandamus* would not lie to control his discretion.

2d. That under the Constitution, the court had no power to compel an officer of the executive department, nor any member of the body of magistracy of said department, whose powers are defined by the Constitution, to perform an official duty.

The duties of the Governor, of the Treasurer and of the Controller being defined by the Constitution, it was contended in argument by the counsel for the Controller, that each of these was supreme in his own department.

"If this position be regarded as untenable," say the counsel, "then, let us suppose that a peremptory *mandamus* had been awarded against the Controller, which he refused to obey. What then would be the remedy against him to enforce the judgment of the court? It must have been to attach the Controller for a contempt of court, and to imprison him till he complied with its order.

"Let us further suppose that the State Treasurer had refused to sign the bonds, which he was required to do by the charter of the company, and had also refused to obey a *mandamus* of the court to compel him to sign them, then, why should not he, like the Controller, be attached and imprisoned for contempt of court?

"Let us further suppose that the Governor of the State had refused to sign them, and had also refused to obey a *mandamus* requiring him to subscribe his name as Governor to these bonds — would he not, for contempt of court, have been arrested and sent to jail with the Treasurer and Controller, who were already there?

"We must suppose, that if such were the law, the Governor, who was the chief executive officer of the State, whose main duty it was to see that the laws were faithfully executed, would, as a good law-abiding citizen, have gone meekly to jail.

"Let us also suppose that these three high officials, after trying for a time the gloomy walls of a prison, should upon consultation have determined that it was better to execute the bonds, and thus preserve at least their own freedom —

and they had executed them accordingly. Would this have ended the trouble? No! for the Legislature might still refuse to make an appropriation to pay the bonds. What then must be done? Would the judge of the District Court of Travis County have awarded a mandamus to the Legislature to compel that body to make an appropriation adequate to meet the semi-annual interest and the annual sinking fund?

"In case of refusal, would he have sent the members of the Senate, and those of the House of Representatives, constituting the officers of the legislative department of the government, to the Austin jail, to which he had recently consigned the Governor, Treasurer and Controller of the Executive Department?

"Would not this have amounted to a combination of the powers of the legislative, the executive and the judicial departments in one man — the judge of the District Court of Travis County? And this Mr. Madison, the great expounder of constitutional law, said was the very definition of tyranny.

"The position becomes absurd, when it is borne in mind that the members of the executive department and those of the Legislature, are elected by the people, while the judge of the District Court of Travis County, awarding the *mandamus*, obtained his office by the appointment of E. J. Davis, at that time the Governor of Texas."

In this connection it may be remarked that this district judge belonged to that numerous class of officers, then commonly denominated carpet baggers. How humiliating to the Governor! How galling to the people of Texas! would have been the exercise of *such powers, by such an officer!!*

The great success which Mr. Harris has attained in the practice of law and in all the affairs of life may be largely attributed to his preparatory course and early training. He made success the goal of his youthful ambition, and kept that one object constantly in view. He was taught at an early age to rely upon his own exertions, and he recognized that his attendance at the university was the great

opportunity of his life. His limited means precluded him from those indulgences which too often dissipate the efforts of genius, and mar both the advantages and prospects of the student. His observations led him to note that those students who enjoyed the prospect of large inheritances, and who were prodigal in their expenditures, made the slowest progress in their studies; and he learned to appreciate the advantages of the retraints which poverty places upon the diversions of pleasure. He thus acquired the habits of labor and self-denial without which the highest ambition and the brightest genius will fail to reach the goal of success, especially in the exacting field of law.

These qualities, thoroughly wrought into his character, he brought to bear upon the study and practice of his profession. His first step is to thoroughly learn the facts of his cases and then to study the applicable law. When this is done and he is satisfied with the merits of his side of the controversy, he enlists every energy in the cause and identifies himself with the interests of his clients.

He is more of what may be called a text than a case lawyer. He relies more upon the principles of law than the power of precedent, which can not always comprehend the varied colors and features of fact, or gather them within the broad folds of parity or analogy. While he is careful and painstaking in the written preparation of his cases, he is remarkably forcible and effective in oral argument, both before the court and the jury, and it has been the constant practice of his associates to concede to him the privilege of making the closing argument.

His social characteristics are no less cultivated than his professional attributes. He is a man of courteous manners, refined ethics, and engaging address. Kind-hearted, generous and keenly sensitive to the respect due to others and to himself, he blends the cultured uniformity of the well-bred Virginian with the more intensified qualities of the true Texan.